

Legal Update for June 14, 2012 (Tori Sundheim, Legal Intern)

In re Katrina Canal Breaches Litigation 673 F.3d 381 (5th Cir. 2012)

- Defines the protection of government flood projects under the **Flood Control Act of 1928, 33 U.S.C.A. § 702c**.
 - Provides immunity to the U.S. for any damage from or by floods or flood waters (James)
 - The immunity doesn't cover flood protection when govt goes forth with construction of an impracticable levee:
 - The Act does not apply to construction for non-flood control purposes. (Henderson)
 - Applies to both personal and property damage
- **Implications for Delta Plan Ch 7: Policies and Recommendations:**
 - RR R9: Limit State Liability—The legislature should consider making changes to State law that would give State agencies the same level of immunity with regard to flood liability as federal agencies have under federal law.
- **Purpose of the Act (3 main factors):**
 1. **There was a need for flood protection**
 2. **The government would be subject to excess litigation, especially since flooding is already a problem**
 3. **The government needs discretion to operate flood control.**
 - **flood control** and multi-purpose reservoirs to **balance competing objectives**.
 - For example, the government can deviate from recommended release schedules to store water to minimize downstream **flooding**.
- **Rule: We recognize immunity for any flood-control activity engaged in by the government, even in the context of a project that was not primarily or substantially related to flood control.**
- **Court Analysis:** character of the waters that cause the relevant damage and the purposes behind their release. (Central Green). Waters that constitute “floods or flood waters” within the meaning of Section 702c are not all waters that pass through a federal flood-control project, but are instead waters of a certain “character.”
- **The 9th Circuit** was willing to limit liability even knowing that other circuits might not under the slightly different nexus test.

We will continue to monitor the potential effects and implications of this decision

Karuk Tribe of California v. U.S. Forest Service, 2012 WL 1959231(9th Cir., June 1, 2012, 05-16801)

- Lower court findings affirmed.
 - The NOI approvals by the US Forest Service required federal wildlife agency consultation to determine whether the activity may affect the endangered species or a critical habitat.
- **Goal:** make sure consultation occurs to protect ESA critical habitat findings (motorized sluicing, panning and suction dredging).
 - motorized sluicing: pumping water onto streambanks to process excavated rocks, gravel, and sand in a sluice box. As the material flows through the box, a small amount of the heavier material, including gold, is slowed by “riffles” and is then captured in the bottom of the box. The remaining material runs through the box and is deposited in a tailings pile.
 - suction dredging: uses gas-powered engines to suck streambed material up through flexible intake hoses that are typically 4-5 in. in diameter- the streambed material is deposited into a floating sluice box and the excess discharged in a tailings pile in or beside the stream. Depths are usually 5 but can be up to 12 ft deep.
- **Endangered Species Act:** imposes on all agencies a duty to consult with either the Fish and Wildlife Service or the NOAA Fisheries Service before engaging in any discretionary action that may affect a listed species or critical habitat.
 - This reflects a “conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”
- **California Implication:**
 - Suction Dredging is bad for critical habitat of (at the very least) coho salmon:
 - Disturbance, entrainment turbidity, pollution, temperature change, destabilized stream bed, decrease in food base, loss of cover
 - **Legal recognition** (of importance of ESA) and that in-stream disturbances could affect co-equal goals via ecosystem.
 - Legislation-SB 640 (signed by Schwarzenegger)
 - Judiciary- Leeon Hillman v. California Dept. of Fish and Game, now DFG must perform Environmental and CEQA review before issuing permits. Projected completion is 2016.
 - Implications:
 - *competing CEQA claims could result in another round of CEQA review*
 - *DFG may not be able to complete before 2016 if new round*
 - *Takings*
- **Test:** Whether the Forest Service’s approval of NOIs is “agency action” and whether the approved activities “may affect” a listed species or its critical habitat, triggering a consultation requirement under the ESA. ESA definition of **agency action**: any action authorized, funded, or carried out by a federal agency. For agency action, it is an action but it must be a discretionary action warranting consultation (otherwise it’s a moot point because the procedure would need to be changed rather than criticizing the action of those carrying out the procedure).
 1. Activities “**may affect**”: By definition, mining activities require NOI’s BECAUSE they “may affect” an endangered species.

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